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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

10 KATE CARRIG,

11 Plaintiff,

12 v.

13 KELLOGG USA INC.,

14 Defendant.
15

CASE NO. C12-837RSM

ORDER ON MOTION TO COMPEL

16 This matter is before the Court for consideration of defendant's motion to compel answers to
17 discovery. Dkt. # 13. Plaintiff Kate Carrig brought this employment discrimination action pursuant to
18 Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.*, and state law against gender discrimination
19 and sexual harassment, RCW 49.60 *et seq.* Dkt. # 1. The claims are based upon a three-month period
20 of short-term disability leave which plaintiff took in 2011 due to the stress of her working environment.
21 *Id.*, ¶ 2.8. She asks in her prayer for relief for compensation for lost wages, together with damages for
22 emotional distress and other relief. *Id.*

23 Defendants have now moved pursuant to Fed.R.Civ.P. 37 to compel responses to interrogatories
24 and Request for Production regarding plaintiff's health care providers and medical records. Counsel has
25 provided certification of a good faith effort to resolve the matter without Court intervention.
26 Declaration of Leigh Ann Tift, Dkt. # 14, ¶ 5. Although this certification does not fully comply with
27 the requirement that it "must list the date, manner, and participants to the conference," the deviation is
28 minimal, so the Court will address the merits of the motion in order to expedite discovery in this matter.

1 Local Rule LCR 37(a)(1). For the reasons set forth below, defendant's motion shall be granted in part.

2 DISCUSSION

3 Interrogatory No. 20 asks plaintiff to

4 [i]dentify each health practitioner, including but not limited to physicians, psychiatrists, and
5 mental health counselors, who has treated or examined you for any problem that you contend
6 resulted from, and/or was exacerbated by, any allegedly unlawful acts of Defendant or its
agents, and for each such health practitioner, identify the date(s), reason(s) and conditions(s)
for which you sought examination or treatment.

7 Tift Declaration, Dkt. # 14, Exhibit 1. Plaintiff responded with an objection that the information sought
8 is protected by the physician-patient and psychiatrist-patient privileges, that it seeks private health
9 information that is not subject to disclosure, and that it is irrelevant as well as overbroad in scope. *Id.*

10 Interrogatory No. 21 asks plaintiff to

11 [i]dentify each health practitioner (including but not limited to physicians, psychiatrists, and
12 mental health counselors) who you have not identified above who has treated or examined
13 you at any time during the last ten years, and for each such health practitioner, identify the
date(s), reason(s) and condition(s) for which you sought examination or treatment.

14 *Id.* Plaintiff objected to this interrogatory on the same bases she asserted in objecting to Interrogatory
15 No. 20, above. *Id.*

16 Request for Production No. 23 asks plaintiff to "[p]roduce any and all documents that relate to
17 any treatment or examination by you by any of the health practitioners you are requested to identify in
18 the prior two interrogatories." *Id.* Again, plaintiff objected on the grounds of privilege, privacy, lack of
19 relevance, and overbreadth. *Id.* She did agree to provide, without waiving any privilege,
20 correspondence concerning her short-term disability claim. *Id.*

21 Defendant contends that under both state and federal law, plaintiff has put her mental condition
22 at issue in this lawsuit by claiming damages for emotional distress. Plaintiff opposes the motion to
23 compel by asserting that she has alleged mere "garden variety" emotional distress, which does not waive
24 the physician-patient privilege; she is not seeking compensatory damages for medical treatment or care;
25 she will not call any expert witnesses to testify to her mental or emotional state or damages therefrom;
26 and she does not rely on health care records to support her claims. Plaintiff's Opposition, Dkt. # 15, p.
27 3.

28 The physician-patient and psychologist-patient privileges are protected by statute in Washington.

1 RCW 5.60.060(4) (physicians); RCW 18.83.110 (psychologists). However, under Washington law,
 2 “Ninety days after filing an action for personal injuries or wrongful death, the claimant shall be deemed
 3 to waive the physician-patient privilege.” RCW 5.60.060(4)(b). Washington courts have recently
 4 applied this statute to find the psychologist-patient privilege waived in the context of emotional distress
 5 claims in cases brought under the Washington Law Against Discrimination, RCW 49.60.

6 Thus, when a plaintiff puts his mental health at issue by alleging emotional distress, he
 7 waives his psychologist-patient privilege for relevant mental health records. The defendant
 8 is entitled to discover any records relevant to the plaintiff’s emotional distress. . . . [S]uch
 9 records and testimony are relevant in showing causation or the degree of the alleged
 emotional distress. Even if the plaintiff stipulates that he will not introduce any psychologist
 or expert testimony, the records may still be relevant to show causation and magnitude.

10 *Lodis v. Corbis Holdings, Inc.*, —P.3d—, 2013 WL 149879 (Wash.App.Div I, January 14, 2013).

11 The federal law approach to waiver is more complicated. District courts have adopted different
 12 approaches to determine whether the patient has waived his or her psychotherapist-patient privilege. *See*
 13 *Fitzgerald v. Cassil*, 216 F.R.D. 632, 636-37 (N.D.Cal.2003). Under the broad approach, courts have
 14 held that a simple allegation of emotional distress in a complaint constitutes waiver. *See Sarko v. Penn-*
 15 *Del Directory Co.*, 170 F.R.D. 127 (E.D.Penn.1997); *see also Doe v. City of Chula Vista*, 196 F.R.D.
 16 562 (S.D.Cal.1999). Under the narrow approach, at the other end of the spectrum, courts have held that
 17 there must be an affirmative reliance on the psychotherapist-patient communications before the privilege
 18 will be deemed waived. *See Vanderbilt v. Town of Chilmark*, 174 F.R.D. 225 (D.Mass.1997); *see also*
 19 *Hucko v. City of Oak Forest*, 185 F.R.D. 526 (N.D.Ill.1999).

20 There is a middle ground between the *Sarko* and *Vanderbilt* lines of cases. Under this approach,
 21 courts have generally found a waiver when the plaintiff has done more than allege “garden-variety”
 22 emotional distress. Garden-variety emotional distress has been described by one court as “ordinary or
 23 commonplace emotional distress,” that which is “simple or usual.” In contrast, emotional distress that is
 24 not garden variety “may be complex, such as that resulting in a specific psychiatric disorder.” *Ruhlmann*
 25 *v. Ulster County Dep’t of Soc. Servs.*, 194 F.R.D. 445, 449 n. 6 (N.D.N.Y.2000). In *Ruhlmann*, the court
 26 concluded that the plaintiff did not waive the psychotherapist-patient privilege by seeking such garden-
 27 variety or “incidental emotional distress damages.” *Id.* at 450. Similarly, in *Santelli v. Electro-Motive*,
 28 188 F.R.D. 306 (N.D.Ill.1999), the court held that the plaintiff avoided waiver of the privilege by

1 limiting the compensation she sought to humiliation, embarrassment, anger, and other similar emotions.
 2 *Id.* at 309.

3 Applying the “middle ground” approach here, the Court finds that plaintiff has waived the
 4 privilege by asserting more than a “garden variety” claim of emotional distress. She does not simply
 5 seek damages for ordinary emotional distress that resulted directly from the alleged discrimination and
 6 harassment; she seeks compensation for wages lost during a period of disability leave she took on
 7 account of that harassment. *See*, Complaint, Dkt. # 1, ¶¶ 2.8, 2.10, 3.7, 4.3. As this Court has observed
 8 previously, emotional distress which is so severe that it eliminates a person’s ability to work and forms
 9 the basis for leave is not “garden variety.” *Paananen v. Cellco Partnership*, Cause No. C08-1042RSM,
 10 Dkt. # 25, p. 4.

11 Moreover, plaintiff admitted in her response to interrogatories that she previously took short-
 12 term disability leave in 2006 and again in 2008. Tift Declaration, Dkt. # 14, Exhibit 1, Interrogatory No.
 13 4. In light of this history, defendant is entitled to discovery of plaintiff’s medical and counseling
 14 records to evaluate both causation and magnitude of the emotional distress which led to her 2011 period
 15 of disability, for which she claims damages from defendant. Defendant is also entitled to discovery of
 16 medical records which may shed light on the basis for her prior periods of disability, for purposes of
 17 comparison and cross-examination.

18 CONCLUSION

19 Accordingly, defendant’s motion to compel is GRANTED IN PART. Plaintiff shall, within ten
 20 days of the date of this Order, answer the interrogatories and produce medical and counseling records
 21 (or provide signed releases) for the time period beginning January 2006 through the present.

22 Neither party has addressed the Fed.R.Civ.Proc. 37 provision for apportioning award of
 23 reasonable expenses in bringing the motion. Fed.R.Civ.P. 37(a)(5)(C). The Court accordingly declines
 24 to award expenses.

25 DATED this 30 day of January 2013.

26 

27 RICARDO S. MARTINEZ
 28 UNITED STATES DISTRICT JUDGE